Office-Supreme Court, U.S.
FILED
APR 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1022

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A.,

Petitioner,

—against—

ORION SHIPPING & TRADING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. JOSEPH NOBEE
Attorney for Petitioner
Office and Post-Office Address:
99 John Street
New York 38, New York

BIGHAM, ENGLAR, JONES & HOUSTON
J. BOND SMITH, JR.,
Of Counsel.

INDEX

	PAGE
Opinion Below	2
Jurisdiction of This Court	2
Questions Presented	3
Statutes Involved	3
Statement	3
Reasons for Granting Writ	7
Conclusion	14
Relevant Statutes	App. 1
Opinion of District Court	App. 3
Opinion of Court of Appeals	App. 16

TABLE OF CASES CITED

United Steel Workers v. *Enterprise Corp.*, 363 U.S. 593 (1960) 10

Anthony P. Miller, Inc. v. *Wilmington Housing Authority*, 179 F. Supp. 199 (D.C. Del. 1959) 10, 11, 12

Other Authorities Cited

PAGE

Title 28, U.S.C.A., Section 1254(1) 2

Title 9, U.S.C.A.:

Section 10 .....3, App. 1

Section 11 .....3, App. 1, App. 2

Constitution of the United States, Fifth Amendment .....3, App. 2

McCormick on Damages, sec. 44, p. 165 13

Williston on Contracts, sec. 1345 13

13 *New York Jurisprudence*, section 39 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A.,

Petitioner,

—against—

ORION SHIPPING & TRADING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review that part of its judgment entered on February 25, 1963, which affirms the judgment of the United States District Court for the Southern District of New York in favor of Orion Shipping & Trading Co., Inc. and against Eastern States Petroleum Corporation of Panama, S.A. in the sum of $1,079,983.01.

Opinion Below

The opinion of the Court of Appeals which affirmed the District Court is reported at 312 Fed. Rep. 2nd 299. A copy of the opinion is contained in the appendix hereto, at pp. App. 16 to App. 21.

The opinion of the District Court (449a to 459a) is reported at 206 Fed. Supp. 777. A copy of the opinion is contained in the appendix at pp. App. 3 to App. 15.

Jurisdiction of This Court

The decision of the Court of Appeals (Second Circuit), affirming the judgment of the District Court modifying the Award of the arbitration, is dated January 18, 1963.

By orders dated February 25, 1963, entered on February 25, 1963, the Court of Appeals denied the petition of Orion Shipping & Trading Co., Inc. for a rehearing and for a rehearing by the Court, *en banc*, of that part of the judgment of the Court of Appeals which affirmed the District Court's action vacating the Arbitrator's Award against Signal Oil and Gas Company.

Petitioners have not applied for any extension of time to petition for certiorari.

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1254(1).

Questions Presented

May an Arbitrator refuse to require proof that damage was actually sustained and instead apply his own concept of due process by use of his own formula, which has no relevance to the facts of the case, and then award about one million dollars for an alleged breach of a contract?

May a District Court sanction such a departure from the accepted and usual concept of due process in judicial proceedings and confirm such award in the absence of proof of damage?

Statutes Involved

The statutes involved are Sections 10 and 11 of Title 9, U.S.C.A., the Federal Arbitration Act, and the Fifth Amendment of the Constitution of the United States, the pertinent parts of which are printed in the appendix hereto, at pp. App. 1 & 2.

Statement

On October 8, 1954, Eastern States Petroleum Corporation of Panama, S.A. (hereinafter referred to as "Eastern Panama") contracted with Orion Shipping & Trading Co., Inc. (hereinafter referred to as "Orion"),* to transport 10,500 barrels of crude oil per day over a five year period beginning April 1, 1955 and ending March 31, 1960, from Mena al

* Orion purported to act as an agent for an undisclosed principal.

Ahmadi in the Persian Gulf to a refinery at Houston, Texas, owned by Eastern States Petroleum and Chemical Corporation (hereinafter referred to as "Eastern American").

Eastern Panama, a wholly owned subsidiary of Eastern American, also signed with Eastern American a simultaneous transportation contract to transport the same oil for Eastern American, between the same ports.

At Orion's insistance, Eastern American signed a letter guaranteeing Eastern Panama's performance of the contract with Orion.

On March 10, 1959, mandatory controls were placed upon the importation of foreign crude oil by the President of the United States. The amount of foreign crude oil which Eastern American could import on all of its contracts was reduced by half, i.e., from 27,000 barrels per day to 11,810 barrels per day.

Eastern American had unsuccessfully applied to the Oil Import Control Appeals Board at Washington, D.C. for an increased import quota, and unsuccessfully sought to enjoin the Collector of Customs at Houston, Texas from restricting the importation of foreign crude oil.

On April 6, 1959, Eastern Panama and Orion modified the contract of October 8, 1954, by extending the termination date of the contract from March 31, 1960 for one year to March 31, 1961, and by spreading over the two year period the amount of oil to be carried during the final year of the original contract, and by amending the rate.

However, the net result of Eastern American's failure to obtain relief from the governmental restrictions placed upon its importation of crude oil and for an enlargement of the quota, was to drive the company well along the road to economic collapse.

On September 3, 1959, Eastern American was acquired by Signal Oil and Gas Company (hereinafter referred to as "Signal").

Adequate quantities of foreign crude oil could no longer be imported, and the transportation contracted for was far in excess of the needs of Eastern Panama and Eastern American, and both the contract between Eastern American (Signal) and Eastern Panama, and the contract between Eastern Panama and Orion were frustrated.

On September 29, 1959, Eastern Panama terminated the contract with Orion.

On October 7, 1959, Orion filed a libel in admiralty against Eastern Panama for a breach of the contract of affreightment, and against Signal under the alleged contract of guarantee. In due course, an order directing Eastern Panama to arbitrate was entered and affirmed on appeal (281 F. 2d 119).

From the outset, Signal was excluded from the arbitration: first by stipulation of counsel for the parties (251, 245-246R); then by Orion's counsel on the motion to compel arbitration (149-182R); then by the United States District Court for the Southern District of New York in directing arbitration (255-259R); then by the Court of Appeals for the Second

Circuit in affirming such order (284 F. 2d 419); and finally by counsel for the parties during the testimony before the Arbitrator (317A).

The Arbitrator made an award which, with interest, exceeded one million dollars against Eastern Panama for breach of the contract, and against Signal on the guarantee.

The Arbitrator rejected Eastern Panama's demand that Orion prove damage based on its cost of performance and its ability to perform the contract over the balance of the eighteen month term.

The Arbitrator treated these elements of damage as immaterial.

> "Whatever the risks shouldered by the Owners [Orion]; *whatever their profits or their losses might be;* whatever the extent and nature of the exigencies confronting them in the course of performance; whether they have made a good or a bad contract—all such matters obviously were none of the business, concern or interests of the Charterers." (Emphasis added) (Arbitration Award, 78A)

The District Court confirmed the Award in favor of Orion, against Eastern Panama. It vacated the Award with respect to Signal, on the grounds that the Arbitrator had exceeded his powers and made an award on a matter not submitted to him.

The Court of Appeals has affirmed the Award, as modified.

Reasons for Granting Writ

The Award against Eastern Panama amounted to $988,081.98, with interest. While the Award was made as damages, the Arbitrator arbitrarily excluded, as immaterial and irrelevant, evidence of Orion's cost of performance in arriving at the amount of the damages, and neither required nor received any evidence of Orion's ability to perform the contract over the balance of the eighteen month period.

> "Whatever the risks shouldered by the Owners; *whatever their profits or their losses might be*; whatever the extent and nature of the exigencies confronting them in the course of performance; whether they have made a good or a bad contract —all such matters obviously were none of the business, concern or interest of the Charterers." (Emphasis added.) (Award 78a)

Instead of taking proof of damages, the Arbitrator departed from the usual and accepted course of judicial proceeding by rejecting evidence of damages and applying his own notion of due process, which was the application of a formula. The formula would produce the same damage figure regardless of Orion's cost of performance or its ability to perform, i.e., the Arbitrator simply multiplied the number of barrels of oil to be delivered over the remaining eighteen months of the contract by the difference between a "market rate" which he found on the date of termination of the contract and the contract rate.

But the so-called "market rate" was mythical.[4] It was based on letters of foreign brokers which said substantially that the rate of U.S.M.C. minus 75¢ was

"available to owners" on the date of the termination, and that charterers "were willing to charter" at that rate. The Arbitrator arrived at a "market rate" of U.S.M.C. rates, minus 72½%, and even at that rate, there was no evidence that a vessel had been fixed, much less fixed for an eighteen months period over which the contract had to run.

The iniquity of this procedure is borne out by two cases in which the formula would produce the same result.

If Orion's cost of performance under the Eastern Panama contract, either by using its own vessels or by using time-chartered vessels, was higher than the total compensation paid by Eastern Panama to Orion, the termination of the contract would not cause damage to Orion, but instead relieve Orion of a loss-producing burden.

> (In this connection, Stambolis, Orion's chartering man, testified that Orion lost substantial sums on certain vessels utilized under the contract. (333a-334a)).

On the other hand, if Orion's total cost of performing the contract was less than the total compensation paid by Eastern Panama, the termination of the contract would produce damage to Orion, the amount of which would be determined by the difference between the cost to Orion of performing the contract and the contract price.

A formula which produces the same answer in the above two cases should not be enforced by the Federal Court, does not reflect damages as that term is

comprehended when parties make agreements, is arbitrary and a non-sequitur.

The element of cost to Orion has never been proven in this proceeding, and evidence with respect thereto was rejected by the Arbitrator as immaterial. Neither was there evidence of Orion's, or its principal's, ability to perform.

At first the Arbitrator had indicated his intention to require the evidence. Then he abruptly changed his mind. (312a, 313a, 78a).

> "* * * I am of the considered opinion that no particular need arises for the appearance of Mr. B. Goulandris for the more fully disclosed purposes and ends proposed by counsel for Eastern, for the following reasons:
>
> "1. Without intending to have it appear that I have in any way prejudiced what has thus far been presented before me, I have, nonetheless, concluded that no particular right attaches to Eastern to delve into the manner or means by which Orion performed its obligation under this particular and unique 'Contract of Affreightment' * * *
>
> * * * * * *
>
> "3. Finally, I cannot avoid the feeling that to authorize the kind of pursuit proposed by Eastern which I now decide as being too remote, if not completely irrelevant insofar as the basic issues are concerned would only serve to prolong these proceedings far beyond the point I consider as necessary or desirable, in justice to all concerned."

This Court has pointed out that an Arbitrator must look to the agreement between parties as a basis for

making an award and does not sit to dispense his own brand of justice.

In *United Steel Workers* v. *Enterprise Corp.*, 363 U.S. 593, (1960), Mr. Justice Douglas wrote:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.
>
> * * * *
>
> "Nevertheless, *an arbitrator * * * does not sit to dispense his own brand of industrial justice.* He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity *to this obligation, courts have no choice but to refuse enforcement of the award.*" (Emphasis supplied.)

The arbitrary use of the formula in this case obviated not only the necessity of proving damages, but enabled Orion, an agent for his undisclosed principal, to recover a substantial sum in its own right, without proving its or its principal's loss or ability to perform.

In *Anthony P. Miller, Inc.* v. *Wilmington Housing Authority*, 179 F. Supp. 199 (D.C. Del. 1959) a dispute arose over a construction contract which provided that a contracting officer would make final and conclusive findings of fact. One dispute involved the length of delay with which the contractor was chargeable and the

damages resulting therefrom. The contracting officer made his findings which the plaintiff rejected.

Plaintiff's theory was, as the Court said at page 201:

> "Plaintiff alleges that defendant is wrongfully withholding this sum of $23,828, arguing that no such damages for delay are lawfully chargeable to plaintiff because the contracting officer, in making his determination of excusable delay attributable to labor shortages, *applied a formula which was entirely inappropriate and erroneous for such calculation, the result of which amounts to gross error as to constitute constructive fraud.*"

Both parties moved for summary judgment and the Court held, at page 202:

> "Nor is it necessary, in order for the Courts to set aside such a decision, opinion or finding, that the conduct of the arbiter amount to actual fraud. A *finding of constructive fraud is sufficient.* Thus, the finding or decision will be set aside if the decision was fraudulent or was induced by such inattention or indifference as to imply bad faith. American Surety Co. v. Kinnear Mfg. Co., 185 Ark. 959, 50 S.W. 2d 986; or the decision was so arbitrary and grossly erroneous as to constitute bad faith. Levering & Garrigues Co. v. United States, 71 Ct. Cl. 739; or, there is proof of constructive fraud or gross mistake of such a character as to amount to a palpable and substantial wrong. Edward Edinger Co. v. Willis, 260 Ill. App. 106." (Emphasis supplied.)

The Court concluded that plaintiff's objection was "well founded". The Court said, at page 203:

> "* * * The application of the so-called formula * * * was in my judgment a clear non-sequitur * * *"

p. 204:

> "It is unfortunate that a finding of constructive fraud must be made in so many words when, in fact, we are actually dealing with serious errors in calculations. However, the decisions refer to such miscalculations as constructive fraud and I find it necessary to pin that label upon the contracting officer's erroneous findings here although, actually, *there is no hint of bad faith, dishonesty or deliberate wrongful conduct upon the part of the contracting officer or the Authority.*" (Emphasis supplied.)

Provisions with respect to arbitration are being issued with increasing frequency, particularly in maritime contracts, and the extent to which an arbitrator may apply his own concept of due process becomes more and more important to contracting parties, in general, and should be delineated by this Court.

The Federal Arbitration Act was expressly intended to afford minimum standards of arbitral due process, not to provide a means for avoiding or eliminating it and permitting an arbitrator to substitute his own arbitrary concept.

The Arbitrator, in making the Award against Eastern Panama, and the courts in affirming it, have avoided affording Eastern Panama the basic elements of due process.

The true concept of damage, which is the essence of every agreement and, therefore, of due process, is properly defined as:

> "* * * money compensation, *to place you in the same position as respects your pocketbook as you would have occupied if no wrong had taken place.*" (Emphasis supplied.) (*McCormick on Damages*, sec. 44, p. 165.)
>
> "* * * A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract will not justify damages based on the assumption that the profit would have been made. *But though there must be evidence of substantial damage in order to justify recovery of more than a nominal* sum, the exact amount need not be shown. * * *" (Emphasis supplied.) (*Williston on Contracts*, sec. 1345.)
>
> "* * * The loss or injury actually sustained, rather than the price paid, or agreed to be paid, on full performance, is the proper measure of damages for a breach of contract." (13 *New York Jurisprudence*, section 39.)

It is submitted, therefore, that the Court should rule on the question of whether an arbitrator may substitute his own brand of justice and due process to the exclusion of the accepted, and usual course of judicial proceedings.

CONCLUSION

In view of these considerations, petitioners respectfully submit that this petition should be granted.

Respectfully submitted,

J. JOSEPH NOBLE
Attorney for Petitioner
Office and Post-Office Address:
99 John Street
New York 38, New York

BIGHAM, ENGLAR, JONES & HOUSTON
J. BOND SMITH, JR.,
Of Counsel.

Relevant Statutes

TITLE 9

Section 10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration——

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c. 392, § 1, 61 Stat. 669.

Section 11

In either of the following cases the United States court in and for the district wherein the award was

made may make an order modifying or correcting the award upon the application of any party to the arbitration——

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. July 30, 1947, c. 392, § 1, 61 Stat. 669.

CONSTITUTION OF THE UNITED STATES

Amendment V

"No person shall . . . be deprived of . . . property, without due process of law . . ."

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 199–179

ORION SHIPPING & TRADING CO., INC.,

Libelant,

—against—

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A., EASTERN STATES PETROLEUM AND CHEMICAL CORPORATION and SIGNAL OIL & GAS COMPANY,

Respondents.

APPEARANCES:

HEALY, BAILLIE & BURKE, Esqs., of New York, N. Y.
Proctors for Libelant

RAYMOND J. BURKE, Esq.
THOMAS A. DILLON, JR., Esq.
Of Counsel

BIGHAM, ENGLAR, JONES & HOUSTON, Esqs., of New York, N. Y.
Proctors for Respondents

J. JOSEPH NOBLE, Esq.
J. BOND SMITH, JR., Esq.
Of Counsel

DAWSON, *D. J.*:

This is a motion by the libelant, Orion Shipping & Trading Co., Inc. (hereinafter called Orion) for an

order under a provision of the United States Arbitration Act, 9 U.S.C. §9, confirming an arbitration award in favor of Orion against Eastern States Petroleum Corporation of Panama, S.A. (hereinafter called Eastern Panama) and Signal Oil & Gas Company (hereinafter called Signal), or in the alternative, modifying the award as to Signal and confirming it as to Eastern Panama. The respondents Eastern Panama and Signal have filed a cross-motion to vacate or modify the award of the arbitrator on the grounds, *inter alia*, that the award in the sum of $988,081.98, together with interest, is arbitrary and grossly excessive, that the arbitrator committed misconduct in his computation of the damages and in including Signal in his award, and that the arbitrator exhibited evident partiality in favor of Orion and against Eastern Panama and Signal.

Background of the Arbitration

In the latter part of October 1954, Orion and Eastern Panama entered into a Contract of Affreightment (herinafter called the Contract), dated as of October 8, 1954, under which Eastern Panama agreed to furnish and Orion agreed to transport an average of 10,500 barrels of crude oil per day from the Persian Gulf and other areas to a refinery at Houston, Texas, owned and operated by Eastern Panama's parent corporation, Eastern States Petroleum and Chemical Corporation (hereinafter called Eastern American).[1] At the request of Orion, Eastern American which had participated in the preliminary negotiations for the

[1] As of the time when the Contract was signed Eastern American was known as Eastern States Petroleum Company, Inc.

Contract, issued a letter guaranteeing performance of the Contract by Eastern Panama. Eastern American was subsequently merged into Signal.

The Contract was initially to be in effect for a period of five years beginning April 1, 1955, terminating on March 31, 1960 and was later extended to March 1961.

On March 10, 1959, the President of the United States promulgated mandatory oil import quotas on the importation of crude oil into the United States. On September 29, 1959, Eastern Panama notified Orion of its decision to terminate the Contract on the ground that as a result of the imposition of the oil import quota the purpose of the Contract was frustrated.

The Contract contained an arbitration clause and pursuant to an order of this court on March 3, 1960, Eastern Panama was directed to proceed to arbitration with Orion to determine the validity of the termination and to ascertain the damages to Orion, if any. The order compelling Eastern Panama to arbitrate was affirmed by the Court of Appeals. *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corporation of Panama, S.A.*, 284 F.2d 419 (2d Cir. 1960).

Hearings were held before the sole arbitrator, Admiral Edmond J. Moran, during the period from July to November 1961. On February 13, 1962 the arbitrator rejected the defense of frustration and rendered a written award (hereinafter called the Award) in favor of Orion in the sum of $988,081.98, together with interest. The Award provided for payment of the amount awarded "by the Eastern States Petroleum Corporation of Panama, S.A., or, as the situation

requires, by their guarantors, in person of Signal Oil & Gas Company, as the surviving corporation of the merger between the latter and the said guarantors, in person of Eastern States Petroleum & Chemical Corporation. . . ."

Validity of the Award as Against Eastern Panama

The respondents urge that the Award should be vacated for the following reasons:

1. That the sum awarded of $988,081.98, together with interest, is arbitrary, grossly excessive and being totally unsupported by any evidence constitutes legal fraud on Eastern Panama.

2. That the arbitrator committed misconduct in refusing to hear testimony material to the question of damages and in making an award without receiving any credible proof that any damage was actually sustained.

3. That the arbitrator exhibited evident partiality in favor of Orion against Eastern Panama and Signal by rejecting all the contentions of Eastern Panama and Signal and accepting all contentions of Orion.

4. That the arbitrator imperfectly executed his powers in that he failed to allow respondent Eastern Panama the amount of the address commission which Orion conceded Eastern Panama was entitled to receive.[2]

---

[2] In addition to the above four grounds, Signal urges that the Award should be vacated as to it because it was not a party to the arbitration proceedings and the arbitrator exceeded his powers in including Signal in the Award. This latter argument will be considered in a subsequent section of this opinion.

Opinion of District Court

The nature and extent of federal court review of arbitration awards is strictly limited by statute.[3] The statutory provisions do not permit a review de novo, nor will an award be vacated on the grounds of erroneous findings of fact or of misinterpretations of law.

> "Were we empowered to view the matter *de novo*, we would find much to persuade in the arguments advanced by the dissenting arbitrator. But as respondent recognizes, the court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated. See Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681 (1950). The statutory provisions, 9 U.S.C. §§ 10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do

[3] Section 10 of the Arbitration Act (9 U.S.C. § 10) provides:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law. . . ." *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805, 808 (2d Cir. 1960).

The reasoning used by the Court of Appeals in the *Amicizia* case was expressed over 100 years ago by the United States Supreme Court in *Burchell* v. *Marsh*, 17 How. 344, 15 L. Ed. 96, 99 (1854) as follows:

> "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. . . ."
>
> "Courts should be careful to avoid a wrong use of the word 'mistake', and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. . . ."

The moving papers fail to demonstrate the existence of any of the statutory grounds for vacating the arbitrator's award against Eastern Panama.

Opinion of District Court

The principal complaint by the respondents relates to the arbitrator's computation of damages. The Court finds no misconduct or partiality on the part of the arbitrator. He apparently performed his duties carefully, impartially and with a great deal of patience and thoughtfulness.

Basically the arbitrator computed the amount of damages by taking the difference between what he determined to be the tanker market rate on the day of termination of the Contract and the contract rate, multiplied by the number of barrels of oil remaining to be shipped on the termination date, plus an amount of damages, at the same rate, for some optional quantities of barrels which Orion might have elected to transport under the Contract. Eastern Panama contends that the arbitrator should have taken evidence as to Orion's costs of performing the Contract, to determine whether the Contract would have yielded a profit, and to determine whether the termination actually resulted in damage to Orion.

The contention of Eastern Panama that the actual cost of performing the Contract should have been taken into consideration was carefully considered by the arbitrator in reaching his decision to apply the market rate as the subtrahend in determining the amount of damages to be awarded. The conclusion of the arbitrator not to consider actual cost is in accordance with the general method of computing damages where damage is ordinarily determined by deducting the market value from the contract price. Actual cost in such case is usually irrelevant. *McCormick, Damages*, §44, 46.

It is true that the arbitrator did not apply the rule of damages followed in cases involving a breach by the

charterer of a single ship. The rule in such a case "is that the shipowner is entitled to the net amount that would have been earned under the charter sued on, less the net amount actually earned, or which could with reasonable diligence have been earned during the time required in the voyage named in the charter." *Ainesworth Coal & Iron Co.* v. *Grangesberg Oxelosund*, 287 Fed. 291, 296 (4th Cir. 1923); *Aaby* v. *States Marine Corp.*, 107 F. Supp. 484, 486 (S.D.N.Y. 1951); *Cargo Ships El Yam* v. *Stearns & Foster Co.*, 149 F. Supp. 754, 765 (S.D.N.Y. 1955). Implicit in this test is a determination of the shipowner's costs of operation.

The contract involved in this action, however, was not a charter party for the charter of a single ship or even of particular ships. It was a contract of affreightment for the carriage of petroleum products from a foreign port to Houston, Texas. By the terms of the contract Orion was to supply vessels and Eastern Panama was to provide petroleum products. There was no designation of the particular vessels to be employed. They could have been "nominated without restriction of flag." Orion could have used its own ships, it could have chartered other ships or made any other arrangements necessary for the transportation. It is well recognized that there is a standard market rate for tankers for the transportation of petroleum products, which rate varies from time to time. When the contract with Orion was cancelled on September 29, 1959, the contract required Orion to transport at rates varying from USMC minus 32½% to USMC minus 65%, but on that date the tanker market rate for a contract of affreightment similar to the Orion contract was

USMC minus 75%. The arbitrator therefore decided that the measure of damages to Orion was the difference between the contract rate at the date of termination and the tanker market rate at that date and computed the damages on this basis. As a result of using this method of determination it became unnecessary to determine the costs of operation of Orion either at or after the date of wrongful termination of the contract. The arbitrator let the parties put in any evidence they desired in connection with the issue before him. He refused, however, to compel Orion to produce books of account to show the costs of operation before and after termination of the Contract on the ground that such costs would be irrelevant.

It cannot be said that the arbitrator was guilty of fraud or misconduct in selecting the method of computing damages that he did. At the very most the arbitrator's method of computation was an error in interpretation of law and it is well settled that this is insufficient ground for refusing to confirm his Award. *Wilko* v. *Swan*, 346 U.S. 427, 436-37 (1953); *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957). Any refusal to require the libelant to produce certain records was not a refusal to receive relevant evidence on the merits of the controversy, but was an exclusion based on the arbitrator's considered conclusion that a determination of the cost of performing the contract was irrelevant. For this Court to refuse to confirm the Award on the ground that the arbitrator refused to take pertinent evidence relevant to the issue of damages would in effect be forcing on the arbitrator its own conclusion as to the correct method of computation of damages.

and this is not proper under the statute. See, *Wilko v. Swan, supra; A. D. Juilliard & Co. v. Baitch & Castaldi, Inc.*, 152 N.Y.S. 2d 394 (Sup. Ct. 1956).

In this very case the Court of Appeals has pointed out that it is not for the court to instruct an arbitrator how to compute damages. See, *Orion Shipping & Trading Co. v. Eastern States Petroleum Corporation of Panama, S.A.*, 284 F. 2d 419, 421 (2d Cir. 1960).[4]

The additional claim of the respondents that the arbitrator erred in not providing for an address commission payable to Eastern Panama is insufficient ground for setting aside or modifying the Award inasmuch as the Contract did not provide for an address commission and the only party entitled to claim commissions under its terms is the chartering brokerage firm of Charles R. Weber Co. If, as alleged, the respondents have an agreement with Charles R. Weber Co. to a part of the commission they may claim this part from them upon payment of the amount of the Award.

The Award as against Eastern Panama must therefore be confirmed.

Validity of the Award as Against Signal

As previously noted, the Award provided for payment by Eastern Panama or "as the situation requires, by their guarantors, in the person of Signal

---

[4] "Appellant also urged that if arbitration should be ordered without summary trial, the court should instruct the arbitrators how to compute Orion's damages. It is not surprising that this contention finds no judicial support, since, if accepted, it would result in a serious curtailment of the arbitrator's function, a function which, once arbitration is chosen by the parties, should not be encroached upon by the courts." 284 F. 2d at p. 421.

Oil & Gas Company. . . .". Signal was not a signatory to the Contract which embodied the arbitration provision, nor was Signal directed to be a party to the arbitration by the order of this court which commanded that the arbitration be carried out. Orion contends, nevertheless, that the award of collateral liability as against Signal should be enforced for the following reasons:

1. Eastern American, Signal's predecessor, may be considered a party to the Contract although it was not a signatory.

2. Eastern American's conduct during the performance of the Contract indicated that it was the real party in interest.

3. Eastern American exercised complete dominion over Eastern Panama.

4. Signal is estopped from denying it is bound by the arbitration award because of its inconsistent position in previous litigations when it relied on the Contract as its own; and

5. Signal assumed the defense of the arbitration proceeding and interposed defenses personal to it.

It is unnecessary to go into each of these arguments in detail. All of them are based on the underlying premise that Eastern Panama functioned as an instrumentality of Eastern American and hence, of Signal. In many respects Orion's characterization of the relationship between Eastern Panama and Eastern American cannot be disputed. It is clear that Eastern American exercised very substantial control

over Eastern Panama, that the officers and directors of the two corporations were almost identical, that the Contract benefitted Eastern American and was in part carried out by it, and that the defense of the arbitration proceeding was in effect undertaken by Signal. All of these factors, however, are insufficient to justify the arbitrator's conclusion that Signal, as the successor of Eastern American, should be held secondarily liable for the amount of the Award. The arbitrator was limited in his functions by the order of the court which directed that the arbitration proceed. This order directed that the arbitration proceed as between Orion and Eastern Panama and included no other party. The arbitrator had no power to subject another party to the terms of the Award, regardless of what he found to be the relationship of that party to the party who was subject to his jurisdiction.

Title 9, U.S.C. § 10(d) provides that a United States District Court may vacate an arbitration award "where the arbitrators exceeded their powers" and § 11 of the same title provides that an award may be modified "where the arbitrators have awarded upon a matter not submitted to them. . . ." The question of liability of Signal as guarantor of the Contract was not a matter submitted to the arbitrator. By including a determination on this matter in his Award the arbitrator exceeded his powers and awarded on a matter not submitted to him, and this provision of the Award must therefore be set aside. Even if Eastern American might have been ordered to submit to arbitration by a court, as an alter ego of Eastern Panama (see *Fisser* v. *International Bank*, 282 F. 2d 231 (2d

Cir. 1960); *Chilean Nitrate Sales Corp. v. The Nortuna*, 128 F. Supp. 934 (S.D.N.Y. 1955)), it was beyond the powers of the arbitrator to make such a decision. See *Brescia Const. Co. v. Walart Constr. Co.*, 238 App. Div. 45, 263 N.Y.S. 13 (1st Dep't 1933). The guarantee on which the arbitrator based his decision was not submitted in evidence at the arbitration proceedings and Signal had no opportunity to submit defenses to liability under the guarantee.

Of course, if Signal is liable as a guarantor of the Contract, as the arbitrator found, the libelant is free to initiate an action against it on the guarantee, if the amount of the Award cannot be recovered against Eastern Panama.

CONCLUSION

The Award of the arbitrator is modified to the extent of deleting from the Award the clause reading "or, as the situation requires, by their guarantors, in person of Signal Oil & Gas Company, as the surviving corporation of the merger between the latter and the said guarantors, in person of Eastern States Petroleum & Chemical Corporation.".

In all other respect the Award is confirmed.

So ordered.

Dated: New York, N. Y.
May 28, 1962.

ARCHIE O. DAWSON
U. S. D. J.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 188—October Term, 1962

(Argued January 8, 1963 Decided January 18, 1963)
Docket No. 27671

ORION SHIPPING & TRADING CO., INC.,
Libellant-Appellee-Appellant,

v.

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A.,
Respondent-Appellant,

and

EASTERN STATES PETROLEUM AND CHEMICAL CORPORATION and SIGNAL OIL & GAS COMPANY,
Respondents-Appellees.

Before:

CLARK, KAUFMAN and HAYS, *Circuit Judges.*

Cross appeals from an order and judgment of the District Court for the Southern District of New York, Archie O. Dawson, J., confirming as modified an arbitration award of damages for breach of contract.

Affirmed.

HEALY, BAILLIE & BURKE, New York, N. Y. (Raymond J. Burke and Thomas A. Dillon, Jr., of counsel), *for libellant-appellee-appellant.*

BIGHAM, ENGLAR, JONES & HOUSTON, New York, N. Y. (J. Joseph Noble and J. Bond Smith, Jr., of counsel), *for respondents-appellants-appellees.*

KAUFMAN, *Circuit Judge*:

Libellant Orion Shipping & Trading Co., Inc., entered into a contract of affreightment with one of the respondents, Eastern States Petroleum Corporation of Panama, S.A. (Eastern Panama), whereby Orion was to transport oil furnished by Eastern Panama from the Persian Gulf to Houston, Texas. Eastern Panama's obligations under the contract were guaranteed by its parent corporation, Eastern States Petroleum and Chemical Corporation, referred to here as Eastern American, and by Eastern American's successor corporation, Signal Oil & Gas Company. When Eastern Panama notified Orion of its decision to terminate the contract because of a presidential promulgation limiting the importation of crude oil into the United States, Orion secured an order, affirmed by this Court, 284 F. 2d 419 (1960), compelling Eastern Panama to submit to arbitration[1] the question of breach of contract and damages to Orion. Although it was clear that the liability of Eastern Panama only was to be determined by the arbitrator—such was the decision

[1] Special clause 14 of the contract of affreightment provided for arbitration, according to a prescribed procedure, of "any dispute arising during the execution of this Contract of Affreightment. • • •"

of this Court and the stipulation of the parties—and although Eastern American's (Signal's) guarantee was not submitted into evidence, the arbitrator determined not only that Eastern Panama was responsible for breach of contract to the extent of $988,081.98 plus interest, but also that Signal was liable on its guarantee if Eastern Panama were to default.

Eastern Panama's motion to vacate the award of damages on the ground that it was improperly calculated was correctly denied by Judge Dawson in the court below, for the reasons there stated. Not only has this Court already determined, on the first appeal, that the manner of computing damages was for the arbitrator and not for the courts, 284 F. 2d at 421, but the law is clear that an arbitration award based upon a misinterpretation of law or an insufficiency of supporting facts will not be overturned.[2] See *Wilko* v. *Swan*, 346 U. S. 427, 436-37 (1953); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805, 808 (2d Cir. 1960); *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F. R. D. 359, 362 (S. D. N. Y. 1957).

---

[2] 9 U. S. C. § 10 sets down the circumstances in which an arbitration award may properly be vacated:

"(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final and definite award upon the subject matter submitted was not made."

Judge Dawson denied Orion's motion under section 9 of the United States Arbitration Act, 9 U.S.C. § 9, to confirm that portion of the arbitration award holding Signal liable as guarantor of Orion's contractual obligations. He held, properly we think, that the arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding, and that Signal's motion to vacate the award against it should be granted. See 9 U.S.C. §§ 10(d), 11. A decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not been submitted to him is not within the province of the arbitrator himself but only of the court. See *A/S Ganger Rolf* v. *Zealand Transportation Ltd.*, 191 F. Supp. 359, 363 (S.D.N.Y. 1961); *Brescia Construction Co.* v. *Walart Construction Co.*, 238 App. Div. 45, 263 N.Y.S. 13 (1st Dep't 1933); cf. *Fisser* v. *International Bank*, 282 F. 2d 231 (2d Cir. 1960).

Orion agrees that the arbitrator exceeded his powers in determining Signal's liability as guarantor. It also agrees that the question whether Signal should be bound by the arbitration award, although not formally a party to the arbitration clause, is to be determined by the courts and not by the arbitrator. It argues that the District Court, in an action to confirm the award against Eastern Panama, may adjudge Signal liable thereon since Eastern Panama is merely a "shell," while Signal, its "alter ego," is truly responsible for Eastern Panama's obligations. We are cited to *Fisser* v. *International Bank*, *supra*, where this Court held that a parent corporation, if so thor-

oughly in control of its subsidiary as to be deemed an "alter ego," could be ordered to *submit* to arbitration pursuant to a clause in its subsidiary's contract. See *Chilean Nitrate Sales Corp. v. The Nortuna*, 128 F. Supp. 934 (S. D. N. Y. 1955).

It may well be, as Judge Dawson indicated below, that Eastern Panama is thoroughly dominated by Signal, and that Signal is properly accountable on an "alter ego" theory. But we hold that an action for confirmation is not the proper time for a District Court to "pierce the corporate veil." The usual office of the confirmation action under 9 U. S. C. § 9 is simply to determine whether the arbitrator's award falls within the four corners of the dispute as submitted to him. This action is one where the judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported "alter ego"? Our conclusion does not in any way impugn the soundness of the reasoning in the *Fisser* case, which arose in the quite distinguishable context of an action to *compel* arbitration under 9 U. S. C. § 4, rather than to confirm.

As Judge Dawson concluded, our holding does not preclude Orion from prosecuting its action, still pending, against Signal as guarantor of Eastern Panama's obligations. Nor does it preclude Orion from bringing a separate action against Signal to enforce the award against Eastern Panama, invoking the "alter ego" theory. But an action to confirm the arbitrator's

award cannot be employed as a substitute for either of these two quite distinct causes of action.

Orion also argues that Signal's conduct during the arbitration proceeding constituted a consent to arbitration which in turn gave the arbitrator power to render an award binding against it. It is asserted that Signal was in effect conducting the arbitration and interposing defenses personal to it alone, and that all witnesses, testimony, and documents emanated from Signal rather than Eastern Panama. Since much of the evidence which would have to be adduced to prove that Signal "consented" to a binding arbitration award would be congruent with the evidence adduced to prove that Signal is Eastern Panama's "alter ego," we hold for the same reasons that it is inappropriate for the District Court to dispose of this argument in an action to confirm.

We therefore affirm the judgment below confirming the arbitrator's award as it applied to Eastern Panama and vacating the award as it applied to Signal.

Office-Supreme Court, U.S.
FILED
MAY 10 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1022

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A.,

Petitioner,

against

ORION SHIPPING & TRADING CO., INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAYMOND J. BURKE
Attorney for Respondent
52 Wall Street
New York 5, New York

HEALY, BAILLIE & BURKE
of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	3
Argument	8
Conclusion	16

Table of Cases Cited

Abby v. *States Marine Corp.*, 107 F. Supp. 484 (S.D.N.Y. 1951) 10

A. D. Juilliard & Co., Inc. v. *Baitch & Castaldi, Inc.*, 152 N.Y.S. 2d 394 (Sup. Ct. 1959) 10

Ainesworth Coal & Iron Co. v. *Grangesberg Orelosund*, 287 Fed. 291 (4th Cir. 1923) 9

Amalgamated Assn. S.E.R. & M.C. Employees v. *Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (3rd Cir. 1951) 12

Amicizia Societa Navegazione v. *Chilean Nitrate & Iodines Corp.*, 184 F. Supp. 116, 274 F. 2d 805 (2nd Cir. 1960) cert. denied 363 U.S. 843 (1960) 10, 11, 14, 15, 16

Anthony P. Miller, Inc. v. *Wilmington Housing Authority*, 179 F. Supp. 199 (D.C. Del. 1959) 11, 13

Bernhardt v. *Polygraphic Co.*, 350 U.S. 198 (1956) 11, 16

Cargo Ships El Yam Ltd. v. *Stearns & Foster Co.*, 149 F. Supp. 754 (S.D.N.Y. 1955) 9

Commercial Solvents Corp. v. *Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957) 15

PAGE

Eastern States Petroleum & Chemical Corp. v. *Walker*, 177 F. Supp. 328, (S.D. Tex. 1959) 5

Grinnell Co. v. *Voorhees*, 1 F. 2d 693 (3rd Cir. 1924) 9

Harris v. *East India Trading Co., Inc.*, 16 Misc. 2d 87, 144 N.Y.S. 2d 894 (Sup. Ct. 1955) 14

Milliken Woolens, Inc. v. *Weber Knit Sportswear*, 20 Misc. 2d 504, 192 N.Y.S. 2d 408 (Sup. Ct. 1956), rev'd on other grounds 9 N.Y. 2d 878, 175 N.E. 2d 826 (1961) 10

San Martine Compania De Nav. v. *Saguenay Term. Ltd.*, 293 F. 2d 796 (9th Cir. 1961) 12

Sullivan v. *McMillian*, 37 Fla. 134, 19 So. 340 (Sup. Ct. 1896) 9

Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 12

Transpacific Transport Co. v. *Sirena Shipping Co.*, S.A., 9 App. Div. 2d 316, 193 N.Y.S. 2d 277 (1959) aff'd. 8 N.Y. 2d 1048, 170 N.E. 391 (1960) 14

United Steel Workers v. *Enterprise Corporation*, 363 U.S. 593 (1960) 11

United Transp. Co. v. *Berwind-White Coal-Mining Co.*, 13 F. 2d 282 (2nd Cir. 1926) 9

Wilko v. *Swan*, 346 U.S. 427 (1953) 11, 12, 15, 16

Zip Mfg. Co. v. *Pep Mfg. Co.*, 44 F. 2d 184 (D. Del. 1930) 10

OTHER AUTHORITIES CITED

Gas & Oil Journal and *Petroleum Week* 8

McCormick, Damages, §§ 44, 46 15

Restatement, Contracts § 336 (c) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1022

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A.,
Petitioner,

against

ORION SHIPPING & TRADING CO., INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York,[1] confirming an arbitration award in favor of respondent against the petitioner, is found at page 449a* and is reported at 206 F. Supp. 777. The opinion of the Court of Appeals for the Second Circuit,[2] affirming the judgment entered on the order confirming the arbitration award, is found at page 465a and is reported at 312 F. 2d 299.

---

[1] The District Court modified the arbitration award by deleting therefrom references to Signal Oil & Gas Company, the guarantor of the petitioner, as a party collaterally liable for payment of the arbitration award.

[2] The Court of Appeals affirmed the decision and order of the District Court. Respondent's petition for re-argument and for consideration *en banc* (472a) as to the liability of Signal Oil & Gas Company was denied (484a and 486a) and this issue is not involved here.

* Record references to the proceeding in the Court of Appeals consist of the page number in the certified record.

JURISDICTION

The judgment of the District Court for the Southern District of New York was affirmed on January 18, 1963. The Petition for the Writ of Certiorari was filed on April 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The only question presented is whether on a motion to vacate an arbitration award under the United States Arbitration Act, a ground other than the statutory provisions of Section 10 of said Act[3] may properly form the basis for such relief.

The questions formulated at page 3 of the Petition are wholly irrelevant to the issue before this Court. On non-statutory grounds, petitioner challenges the award of the arbitrator, as modified, which both the District Court and the Court of Appeals hold to be conclusive of the issues and binding upon the petitioner.

---

[3] Section 10 of the Federal Arbitration Act (9 U.S.C. §10) provides:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matters submitted was not made."

STATEMENT

This proceeding was commenced by a motion of respondent to confirm an arbitration award and a cross motion of petitioner to vacate the award. The dispute arose under a maritime contract which contained a clause providing that any dispute thereunder be arbitrated. A brief reference to the substance of the contract and some related events is indicated.

For several weeks prior to October 8, 1954, respondent and Eastern States Petroleum Company, Inc. (a Delaware corporation, with a refinery and principal office at Houston, Texas, which later changed its name to Eastern States Petroleum and Chemical Corporation ["Eastern American"] and which was subsequently merged into Signal Oil & Gas Company ["Signal"]), negotiated the terms of a long term ton-mileage contract of affreightment. The initial contract was prepared in the names of the respondent and Eastern American (99a). The latter thereafter requested respondent to permit it to substitute in the contract the name of the petitioner, its wholly owned Panamanian subsidiary, on the express understanding that Eastern American would always remain responsible for the full performance of the contract.

On October 20, 1954, a ton-mileage contract of affreightment for a term of five years and for the carriage of over 20,000,000 barrels of crude oil was executed by petitioner and respondent (131a) and concurrently therewith a guaranty of said contract (123a) was executed by Eastern American ("Contract").

The Contract provided for *world-wide trading*† and was based on a mileage factor requiring petitioner to furnish about one-tenth of a barrel of crude oil for every 1,000 miles of transportation. Thus, a barrel of cargo carried from Mena al Ahmadi to Houston had a mileage equivalent of one barrel.[4] Cargoes carried for lesser or greater distances were adjusted in proportion to actual miles of transportation.

---

[4] Referred to as a "Houston" barrel and based on the carriage of one barrel for a distance of 10,013 nautical miles.

† Emphasis ours.

In July, 1957, the United States Government initiated the "Voluntary Oil Import Program" to regulate the importation of crude oil into the United States. It was the experience of the Government that some importers, including Eastern American, were refusing to comply with the Voluntary Oil Import Program even though the basis for restricting such imports was the impairment of national security. Accordingly, the Government on March 28, 1958 adopted sanctions which barred an importer from selling petroleum products to the Government until it satisfied the Administrator of the Voluntary Oil Import Program that it had not imported into the United States crude oil in excess of its allotment under the Voluntary Oil Import Program for three months prior to the submission of its bid to the Government.

Eastern American sold to the United States Government, between 1953 and 1957, petroleum products totaling $99,761,922.49. Part of these sales were made during the period of the Voluntary Oil Import Program (213a). However, with the three-month-prior-to-bid compliance requirement, Eastern American's sales to the government were suspended. Unwilling to abide by the penalty, Eastern American sought to attack the constitutionality of the entire Voluntary Oil Import Program, and on July 21, 1958 filed a complaint "for a declaratory judgment and injunctive relief to declare null, void and illegal * * * the so-called 'Voluntary Oil Import Program' ". (247a)

Judge Holtzoff of the District Court for the District of Columbia denied the injunctive relief and dismissed the complaint (163 F. Supp. 797). On appeal, the United States Court of Appeals for the District of Columbia, reversed on the ground that the complaint should not have been dismissed and remanded the cause to the District Court (271 F. 2d 457). On reargument, Judge Youngdahl again denied the injunctive relief but continued the matter for trial on the merits (165 F. Supp. 363).

Eastern American continued to import crude oil in excess of its allotted quota under the Voluntary Oil Import

Program until the Mandatory Oil Import Program was adopted on March 10, 1959. It again sought administrative relief and urged grounds identical with those theretofore urged upon the Administrator of the Voluntary Oil Import Program, prior to commencing its suit in the District Court for the District of Columbia.

Following an adverse ruling by the Oil Import Appeals Board, Eastern American, with its suit still pending in the District of Columbia, commenced a further action at Houston, Texas, in the United States District Court for the Southern District of Texas.

The Texas District Court summarily dismissed the complaint, stating that the grounds upon which Eastern American sought relief were essentially the same as those asserted in the then pending case in the District of Columbia (40a), and accused Eastern American of "forum shopping", *Eastern States Petroleum & Chemical Corp.* v. *Walker*, 177 F. Supp. 328, (S.D. Tex. 1959).

Yet immediately following the dismissal of the complaint in the Texas case and on September 29, 1959, petitioner cancelled the Contract on the ground that " * * * our affiliated company Eastern States Petroleum and Chemical Corporation, now merged into Signal Oil & Gas Company, has failed in its lawsuit * * * ." (180a).

Subsequent to the adoption of the Mandatory Oil Import Program, and prior to Eastern American's appeal to the Oil Import Appeals Board, respondent agreed to amend the Contract and permit the shipment over a two-year period of the quantity of crude oil then required by the terms of the Contract to be shipped in one year. (Addendum No. 3) (124a). Under the Contract the petitioner was required to furnish 10,500 "Houston" barrels a day,[5] and this amount was reduced to 5,250 barrels per day. This amendment more than offset Eastern American's reduction of import quota barrels under the Mandatory Oil Import

---

[5] Petitioner's obligation to furnish 10,500 barrels per day was unrelated to the Mandatory Oil Import Program. As a Panamanian corporation it had no import quota allocations.

Program as applied to the Contract, and also satisfied the requirement for a plea of "hardship" to the Oil Import Appeals Board.

When the Contract was unilaterally cancelled on September 29, 1959, market freight rates were far below the Contract rate and there remained to be carried over 2,866,000 barrels of crude oil. On October 7, 1959, respondent commenced an action in the District Court against the petitioner and Signal, reserving the right to submit the dispute to arbitration, and process *in personam* with clause of foreign attachment was issued attaching as security the sum of $1,150,000 in a bank account of Signal. Meanwhile, respondent demanded arbitration, and after the attachment was vacated, the petitioner sought to avoid arbitrating the dispute and refused to name an arbitrator. Thereafter, a Memorandum and Order was entered in the District Court (90a) compelling the petitioner to proceed to arbitration before the arbitrator appointed by the respondent[6] and the decision of the District Court was affirmed by the Court of Appeals (284 F. 2d 419).

The petitioner thereupon moved in the District Court for an order to set aside the appointment of the arbitrator appointed by the respondent, and to avoid further delay respondent agreed to join with petitioner in selecting an arbitrator. Petitioner and respondent thereafter mutually agreed upon Admiral Edmond J. Moran as sole arbitrator

---

[6] The arbitration clause provided for unrestricted submission of any dispute and authorized the sole arbitrator to make a binding decision, viz.:

> "Any dispute arising during the execution of this Contract of Affreightment shall be settled in New York, Owner and Charterer each appointing an Arbitrator—Merchant or Broker—and the two thus chosen, if they cannot agree, shall nominate a third Arbitrator—Merchant or Broker—whose decision shall be final. Should one of the parties neglect or refuse to appoint an Arbitrator within twenty-one days after receipt of request from the other party, the single Arbitrator appointed shall have the right to decide alone, and his decision shall be binding on both parties. For the purpose of enforcing awards, this agreement shall be made a Rule of Court." (155a).

and a stipulation and order to this effect was entered in the District Court (88a-89a).

The Contract provided that respondent could furnish tonnage which it "owned, operated, chartered or otherwise controlled" (150a); without restriction as to flag and subject only to a draft limitation of 35 feet at the discharging port and a deadweight not exceeding 39,000 tons.

The Contract also provided that by paying respondent demurrage at rates provided in the Contract (155a), petitioner had the right to stop or reduce the amount of crude oil it was required to furnish by directing the respondent to "lay-up" all or any portion of the equivalent tonnage required to fulfill the Contract.

When Eastern American applied to the Oil Import Appeals Board for an increase in its quota, and subsequently commenced its suit in the Texas Court, it was, in part, based on the ground of "special and undue hardship" under its "long-term tanker contracts" which included the Contract (32a). It was the sworn testimony in both proceedings that Eastern American was losing $16,000 per day (32a) on such contracts. Applying Eastern American's own exhibits and testimony in those proceedings to the Contract as of September 29, 1959, showed a prospective loss to the petitioner under the Contract in excess of $2,600,000.

Similarly, the arbitrator directed petitioner and respondent to submit calculations showing the cost to petitioner had it performed the Contract, but exercised its option under clause 15 to be excused from furnishing any cargoes after September 29th, 1959, the date of cancellation. The evidence was that petitioner would have been obliged to pay respondent demurrage in the amount of $1,428,158.19 to be excused from further performance of the Contract.

That petitioner had no further use for respondent's tonnage cannot be doubted. However, it was not the result of any reduction in the import quota which created this

situation. On the contrary, petitioner concedes it had more than adequate quota to perform the Contract (211a). Indeed, its entire "Change of Trade" argument (66a) to reduce its damages was predicated on the notion it could have imported up to 21,300 barrels per day as would have been required under the Contract for the shorter distances in the Caribbean trade.

It may be relevant to observe, also, that after cancelling the Contract, Signal initiated a policy of "exchanging" its import quotas for domestic oil. According to articles in the *Gas & Oil Journal* and *Petroleum Week*,[7] both authoritative industry publications, a holder of an import quota for foreign crude oil could "exchange" the quota, or any part thereof, for domestic crude oil. By swapping the right to import foreign crude oil, the holder of the import quota acquired a like amount of domestic crude oil, and, in addition, realized a profit of from $.30 to $1.05 on each barrel "exchanged".

Signal filed with the Department of Commerce reports required under the Mandatory Oil Import Program which show that during the unexpired term of the Contract, Signal "exchanged" import quotas with domestic oil companies, for 8,629,184 barrels.

Respondent's claim was for $1,132,706.88, with interest, and the arbitrator awarded respondent damages of $988,081.98, with interest. Judgment was entered in favor of respondent and against petitioner for $1,079,983.10.

ARGUMENT

The petitioner's version of the questions presented is formulated on an unconscionable distortion of the record. The allegation that Admiral Moran refused to require proof that damage was actually sustained and applied his own formula in making his award, cannot be supported by the evidence in this case.

---

[7] The weeks of April 27, 1959 and March 10, 1961, respectively.

I

In the courts below, and again here, petitioner ignored the distinction between a refusal to *hear* or *accept* pertinent and material evidence offered by a party, and a refusal to compel the adverse party to produce certain documents found to be irrelevant and immaterial to the dispute.

Petitioner requested an accounting of virtually all of respondent's vast shipping operations during the eighteen-month period following cancellation of the Contract; none of which was related to the Contract. Admittedly, its purpose was to select respondent's most favorable business ventures and urge the arbitrator to use the earnings from such ventures in mitigation of its damages. Before ruling on this request, the arbitrator required petitioner and respondent to submit interim memoranda on the point.

In substance, it was respondent's position that the documents requested were irrelevant and immaterial since the Contract was not one for "personal services", nor one which the parties contemplated should be performed with any "special means or instrumentality", and therefore the rule as to mitigation of damages by subsequent earnings and profits did not apply to this class of contract, citing, among others, *Sullivan* v. *McMillian*, 37 Fla. 134, 19 So. 340 (Sup. Ct. 1896) *Grinnell Co.* v. *Voorhees*, 1 F. 2d 693 (3rd Cir. 1924); *Restatement, Contracts*, 336(e).

The petitioner admitted the Contract was not a charter and provided for the furnishing of transportation as a *commodity*,† which requires neither "personal service" nor "special means or instrumentalities" i.e., "named" vessels for performance. Nevertheless, every case cited by the petitioner in support of its version of the proper measure of damages, and the materiality of the documents requested, related to cases concerned with charter parties for "named" vessels. Examples of the cases relied upon by petitioner are *Ainsworth Coal & Iron Co.* v. *Grangesberg Oxelosund*, 287 Fed. 291 (4th Cir. 1923), *United Transp. Co.* v. *Berwind-White Coal-Mining Co.*, 13 F. 2d 282 (2nd Cir. 1926), *Cargo Ships El Yam Ltd.* v. *Stearns &*

† Emphasis ours.

Foster Co., 149 F. Supp. 754 (S.D.N.Y. 1955), and *Abby* v. *States Marine Corp.*, 107 F. Supp. 484 (S.D.N.Y. 1951).

After careful consideration, the arbitrator ruled that the documents requested were immaterial. In this respect, the District Court found that "the arbitrator let the parties put in any evidence they desired in connection with the issue before him" (455a). Furthermore, the petitioner submitted detailed exhibits compiled from market reports which establish substantially the same information concerning respondent's chartering that it desired to obtain from respondent's records. In any event it is clear that under the New York arbitration law, upon which the federal statute was patterned,[8] a refusal to require one party to produce documents on the demand of the adverse party is not a refusal by the arbitrator to accept evidence constituting statutory misconduct. *A. D. Juilliard & Co., Inc.* v. *Baitch & Castaldi, Inc.*, 152 N.Y.S. 2d 394 (Sup. Ct. 1959); *Milliken Woolens, Inc.* v. *Weber Knit Sportswear*, 20 Misc. 2d 504, 192 N.Y.S. 2d 408 (Sup. Ct. 1956), rev'd on other grounds 9 N.Y. 2d 878, 175 N.E. 2d 826 (1961).

Moreover, petitioner's attorney admitted during the hearings that the only reason he requested the production of respondent's records was "that notwithstanding the contract right Orion did commit certain vessels"[9] (342a). He continued:

> "That was the only reason we asked for it, not because we felt that that was the only way you could measure

---

[8] *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 F. 2d 184 (D. Del. 1930); to the same effect referring to 9 U.S.C. §§9, 10 and 11, *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corporation*, 184 F. Supp. 110, 117 (S.D.N.Y. 1959):

> "The federal act in respect to the sections now under consideration is almost verbatim like the corresponding provisions of the New York statute, so that the state practice may be regarded as highly persuasive, if not controlling."

[9] To create a climate for acceptance of its version of fixing damages (i.e. based on cases relating to charter parties for "gamed" vessels similar to those referred to herein at page 9), petitioner erroneously referred to vessels employed more than once under the Contract as "committed" or "earmarked" vessels.

the damages, but because we felt that the record ought to be measurable not only on the basis of what the contract said, but what the parties actually did. * * *" (342a).

II.

The Federal Arbitration Act confers no authority upon federal courts to ascertain whether arbitrators correctly applied the law in reaching their award.[10] Nor does any other statute. On the contrary, the courts (including this Court) have held that the award of the arbitrator is final. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); *Wilko v. Swan*, 346 U.S. 427 (1953); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodines Corp.*, 274 F. 2d 805 (2nd Cir. 1960) cert. denied 363 U.S. 843 (1960). The court review provisions of Section 10 of the federal statute, make it beyond doubt that an arbitration award may not be reviewed, except in certain situations involving "corruption, fraud, or undue means", "evident partiality", "misconduct" in refusing postponements or refusing to hear "pertinent and material" evidence, or where the arbitrators have "exceeded their powers". Moreover, the arbitration agreement signed by the petitioner and respondent provided that the award of the arbitrator shall be final.

It is highly significant that the petitioner has not cited a case under the Federal Arbitration Act in support of the Petition. Instead the petitioner has relied upon *United Steel Workers v. Enterprise Corporation*, 363 U.S. 593 (1960), which was concerned with an arbitration award under a collective bargaining agreement, and *Anthony P. Miller, Inc. v. Wilmington Housing Authority*, 179 F. Supp. 199 (D.C. Del. 1959). The latter was not concerned with an arbitration award, but arose on motions for summary

[10] The House of Representatives' Report on the bill which became the Federal Arbitration Act noted that once the arbitral process commences, "the arbitration proceeds without interference by the Court". H. Rep. No. 96, 68th Cong., 1st Sess. (1924), P. 2

judgment in connection with findings of fact by a contracting officer of a Housing Authority.

Since neither of the two cases relied upon by the petitioner involved a proceeding to vacate an arbitration award under the Federal Arbitration Act, both are inapplicable. It is settled that the provisions of the Federal Arbitration Act do not apply to collective bargaining agreements (*Amalgamated Assn. S.E.R. & M.C. Employees* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (3rd Cir. 1951); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).

In the United Steel Workers case the District Court, construing section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. §185), held an arbitration award ordering reinstatement and back pay to individual employees valid and ordered its enforcement, 168 F. Supp. 308 (S.D.W.Va. 1958). The Court of Appeals modified (269 F. 2d 327 (4th Cir. 1959)), and this Court reversed and reinstated, in part, the decision of the District Court. By way of emphasizing (and probably as dictum) that an arbitrator of an industrial dispute under a collective bargaining agreement must not exceed his powers or go beyond the submission, this Court, at page 597, said "* * * an arbitrator * * * does not sit to dispense his own brand of industrial justice * * *. (w)hen the arbitrator's words manifest an infidelity to this obligation, Courts * * * refuse enforcement of the award."

While this case involved a labor dispute and falls into a special class of cases, it has been suggested in one decision that it may be applicable to all arbitration. In *San Martine Compania De Nav.* v. *Saguenay Term. Ltd.*, 293 F. 2d 796 (9th Cir. 1961), the court thought the quoted language probably was similar to a "manifest disregard of the law in the context of the language used in *Wilko* v. *Swan*", 346 U.S. 427 (1953), i.e., when the "arbitrators understand and correctly state the law, but proceed to disregard the same". For very sound reasons the Petition is not predicated on this ground. But given the most favor-

able interpretation the United Steel Workers case lends no support for granting the Petition.

Anthony P. Miller, Inc. v. *Wilmington Housing Authority*, 179 F. Supp. 199 (D. C. Del. 1959), also relied upon by petitioner did not involve an arbitration and accordingly the court was not limited by the court review provisions of the federal statute. Plaintiff alleged that defendant wrongfully withheld a sum of money due to gross errors by a contracting officer in the calculations of figures under a construction contract. The court said at page 204 that "the contracting officer in applying the formula referred to as step 6" was guilty of such obvious and gross error as, under the decisions, would justify a Court in setting the finding aside". It so holding it described the action of the contracting officer as "constructive fraud".

But given the same state of facts under the Federal Arbitration Act and the result would be dissimilar because of the limitation of the court review provisions of Section 10 of the federal statute.[12]

The Miller case is the authority upon which the petitioner relies for its allegation that Admiral Moran applied his own formula in assessing damages. There the complaint was "serious errors in calculations". Here petitioner complains that the application by the Arbitrator of the generally accepted method of assessing damages of the difference between the contract rate and the market value, transforms this legal doctrine into the Arbitrator's "own formula". It is difficult, if not impossible, to see the analogy.

The District Court found that "the moving papers failed to demonstrate the existence of any of the statutory

---

[11] Step 6 of the six step calculation devised to estimate the delay attributable to the stage of labor was: "Reduce the figure of 181.92 days to 151.9 days by multiplying 181.92 by 83.5%".

[12] If miscalculation of figures was apparent on the face of the award, at most the award could be modified or corrected. 9 U.S.C. §11(a).

grounds for vacating the Arbitrator's award" against petitioner (453a). Following the court review provisions of the federal statute, the court declined to review *de novo*, the arbitration proceedings and the award of the Arbitrator. In so doing, the court followed *Amicizia Societa Navigazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805, (2d Cir. 1960), cert. denied 363 U.S. 843 (1960).

Ones dissatisfaction with the quantum of damages awarded by an arbitrator is not a statutory ground for vacating an award. Nor are courts concerned with the quantum of damages awarded in arbitrations. In *Harris* v. *East India Trading Co., Inc.*, 16 Misc. 2d 87, 144 N.Y.S. 2d 894, 900 (Sup. Ct. 1955), the court held as follows:

> "Moreover, it is my opinion that, even if respondent had demanded arbitration limited to a fixed claim for petitioner's anticipatory breach, the arbiters would have had the power under this sweeping clause to undertake a comprehensive study of all relevant factors and require either performance of the contract or payment of damages on the basis of a default date deemed by them to be proper and fair in accordance with the contract, market situation, trade practices and the acts of the parties. It does not seem to me that the courts should interfere with regard to the quantum of damages * * *."

In *Transpacific Transport Co.* v. *Sirena Shipping Co.*, S.A., 9 App. Div. 2d 316, 193 N.Y.S. 2d 277, 280 (1959) aff'd. 8 N.Y. 2d 1048, 170 N.E. 391 (1960), the Appellate Division said:

> It is now well-settled law that there may be remedies in arbitration which would not have been available in a court within conventional actions or proceedings at law or in equity. It is not required that the mode or the quantum of the relief available be the same."

Respondent respectfully suggests that the record in this case evidences no error of law or fact on the part of

the Arbitrator in rendering his award. However, as federal courts have repeatedly held, an error of law or fact does not constitute a statutory ground under the Federal Arbitration Act for vacating an arbitration award.

The District Court said:

"The conclusion of the arbitrator not to consider actual cost is in accordance with the general method of computing damages where damage is ordinarily determined by deducting the market value from the contract price. Actual cost in such case is usually irrelevant. *McCormick, Damages*, §§ 44, 46." (454a)

* * *

"At the very most the arbitrator's method of computation was an error in interpretation of law and it is well settled that this in insufficient ground for refusing to confirm his award. *Wilko* v. *Swan*, 346 U.S. 427, 436-37 (1953); *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957)." (455a)

The Court of Appeals said:

Petitioner's "motion to vacate the award of damages on the ground that it was improperly calculated was correctly denied by Judge Dawson in the court below, for the reasons there stated. Not only has this Court already determined, on the first appeal, that the manner of computing damages was for the arbitrator and not for the courts, 284 F. 2d at 421, but the law is clear that an arbitration award based upon a misinterpretation of law or an insufficiency of supporting facts will not be overturned.[13] *See Wilko* v. *Swan*, 346 U.S. 427, 436-37 (1953); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805, 808 (2d Cir. 1960) * * *." (467a)

---

[13] Footnote omitted.

The petitioner has offered no reason which would justify the exercise by the Court of its discretion to grant a writ of certiorari. This is not a case where the Court of Appeals has rendered a decision in conflict with the decision of another circuit on the same matter. And it is not a case where there is involved an important undetermined question of law which must be determined. Nor is there a question here which is important to the development of federal law relating to arbitration, because the issue of the case is resolved by well recognized and already existing principles. *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956); *Wilko* v. *Swan*, 346 U.S. 427 (1953); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine S. Corp.*, 184 F. Supp. 116, 274 F. 2d 805 (2nd Cir. 1960), cert. denied 363 U.S. 843 (1960).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RAYMOND J. BURKE
Attorney for Respondent
52 Wall Street
New York 5, New York

HEALY, BAILLIE & BURKE
Of Counsel